BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JO ELLEN LEWIS	)	
Claimant	)	
	)	
VS.	)	Docket No. 268,455
	)	
U.S.D. #259	)	
Self-Insured Respondent	)	

ORDER

Claimant requested review of the January 6, 2005 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on June 17, 2005.

APPEARANCES

Jim Lawing of Wichita, Kansas, appeared for the claimant. Robert G. Martin of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that the deposition of Dr. Peter V. Bieri dated April 16, 2004, was a part of the evidentiary record.[1] The parties further agreed that the deposition of claimant dated May 14, 2003 was a part of the evidentiary record.[2]

ISSUES

It was undisputed claimant suffered accidental injury arising out of and in the course of her employment with the respondent. The Administrative Law Judge (ALJ) limited claimant's award to a 10 percent whole person functional impairment. The ALJ determined claimant failed to meet her burden of proof to establish she suffered a task loss as a result

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[1] The ALJ's Award adopted Dr. Bieri's functional impairment rating but failed to list his deposition as a part of the evidentiary record.

[2] Both of claimant's evidentiary depositions were listed as part of the evidentiary record in the ALJ's Award, however, an incorrect date was listed in the ALJ's Award for claimant's first deposition. The date Dr. Bieri's deposition was taken was incorrectly listed as the date for claimant's first evidentiary deposition.

of her injuries and because she failed to make a good faith job search limited her award to her functional impairment rating.[3]

The sole issue raised on review is the nature and extent of disability. Specifically, whether claimant is entitled to a work disability (a permanent partial disability greater than the percentage of her functional impairment).

Claimant argues she made a good faith effort to find comparable employment and therefore should be entitled to a 58.5 percent work disability based on a 100 percent wage loss and a 17 percent task loss. Claimant further argues she sustained her burden of proof regarding task loss due to Mr. Hardin's assessment compared with Dr. Bieri's restrictions.

Conversely, respondent argues that because no physician offered an opinion regarding claimant's task loss she failed to meet her burden of proof to establish a task loss. Respondent further argues the claimant is no longer attempting to find employment and she has not made a good faith effort to find appropriate employment. Consequently, the respondent requests the Board to affirm the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a paraprofessional with the respondent. She was working in the special education department at an elementary school when she was injured. As claimant physically assisted the special needs students, especially a student with cerebral palsy, she developed low back pain which began to cause her problems in November 2000.

Claimant sought medical treatment and was diagnosed with lumbar strain. She was provided conservative treatment with Dr. Frederick R. Smith consisting of anti-inflammatory and muscle relaxant medications, physical therapy, and reduced activity. She was released from treatment on February 12, 2001. At that time she was restricted from lifting greater than 20 pounds on an occasional basis which was defined as not bending and lifting 20 pounds more than once every four to five minutes.[4]

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[3] Apparently the ALJ, after finding claimant failed to make a good faith job search, imputed a wage that was within 90 percent of claimant's pre-injury average gross weekly wage.

[4] R.H. Trans., Cl. Ex. 1.

After the claimant was released from medical treatment she did not return to work for the remainder of that school year. Instead, she received short-term disability for the remainder of that school year. In the fall of 2001, the claimant returned to work for respondent as a reading paraprofessional. After that school year some of the funding for the paraprofessional positions was eliminated and claimant was told she would not be able to continue working in that position the following school year. Claimant then applied for work as a paraprofessional in the other funded positions, such as with pre-kindergarten children, but was not hired.

Claimant has not obtained employment nor worked since the end of the school year in May 2002. She testified she sought paraprofessional work and a list of potential employers where she had sent her resume was stipulated as part of the evidentiary record. It covered the months of September 2002 through April 2003. Since that time claimant has made no concerted effort to find employment.

At her attorney's request, the claimant was examined by Dr. Peter Bieri on October 4, 2002. After a physical examination of claimant the doctor diagnosed her with a lumbar strain and based upon the AMA *Guides*[5], he opined claimant suffered a 10 percent whole person functional impairment. The doctor provided restrictions which consisted of limiting claimant to 20 pounds occasionally, 10 pounds frequently and negligible constant lifting as well as bending, stooping, and twisting at the level of the waist should be performed no more than frequently. As noted by the ALJ, the doctor did not offer an opinion regarding claimant's loss of task performing ability, if any.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[6]

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[7]

The only doctor to testify regarding claimant's functional impairment was Dr. Bieri, who opined claimant had a 10 percent whole person functional impairment. Accordingly, the Board affirms the ALJ's finding that claimant suffers a 10 percent whole person functional impairment.

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[5] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[6] *See* K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

[7] K.S.A. 44-510e(a).

The claimant argues she is entitled to a work disability in excess of her functional impairment. The work disability formula is provided K.S.A. 44-510e(a) and states, in pertinent part:

> The extent of permanent partial disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[8]

As noted, the task loss portion of the work disability formula requires a physician's opinion of the work tasks the claimant has lost. As noted in the ALJ's Award, there is no such physician's opinion in this case. Dr. Bieri was the only physician who testified and he did not offer a task loss opinion. Consequently, the Board affirms the ALJ's finding that claimant failed to meet her burden of proof to establish that she suffered a task loss.

In considering what, if any, wage loss claimant has suffered, K.S.A. 44-510e(a) must be read in light of both *Foulk*[9] and *Copeland*[10]. In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in 1988 Supp. 44-510e(a) (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[11]

Jerry Hardin, a personnel consultant, opined claimant retained the ability to earn $300 a week. Mr. Hardin offered no opinion whether claimant had made a good faith effort to find appropriate employment.

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[8] K.S.A. 44-510e(a).

[9] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[10] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[11] *Id*. at 320.

The ALJ determined claimant failed to make a good faith effort to find employment. When claimant began her job search in September 2002 she simply sent her resume to four prospective employers. In the following months she sent her resume to more prospective employers. But it appears that after her unemployment benefits were exhausted she ceased any significant or meaningful effort to find employment.

Claimant's job search consisted of mailing her resumes to prospective employers. And she indicated that she preferred a job that would provide the same salary and benefits that she made working for respondent. But she agreed she would take a job paying less if it came to the point that food needed to be put on the table. Stated another way, claimant did not refuse to accept lesser paying jobs but because of her financial situation she did not feel compelled to look for those jobs. And after April 2003, claimant did not engage in any significant attempt to return to work. Instead, she sometimes assisted her husband a few hours a week in conducting his business.

Where a claimant has the ability to earn wages but is not doing so, an inquiry must be made into the good faith efforts of the claimant in seeking employment. "An effort that amounts to nothing more than a sham or token effort will not suffice."[12] Based upon the totality of the evidence, the Board concludes claimant has failed to make a good faith effort to find appropriate employment. Although claimant generated a list of prospective employers that she contacted, nonetheless, when viewed in the context that claimant selected potential employers and mailed a resume, but did not utilize the facilities of job service and apparently discontinued sending resumes or making any meaningful effort to find a job at approximately the same time her unemployment benefits were exhausted, the conclusion is that claimant was merely making a token effort to find employment. Consequently, it is necessary to impute a wage to claimant.

As previously noted, Jerry Hardin opined claimant had the ability to earn $300 a week. There was no further evidence proffered on the issue and his testimony is uncontradicted. The Board finds claimant retains the ability to earn $300 a week. This finding results in a 34 percent wage loss. When combined with claimant's 0 percent task loss the claimant has a resultant 17 percent work disability.

When claimant returned to a job with respondent in the 2001/2002 school year she would be entitled to her 10 percent functional impairment. But due to the accelerated pay out formula and because the compensation rate does not change, it makes no difference in the calculation of this award or in the final amount due, therefore, this award simply uses the final percentage of work disability to compute the total number of weeks of permanent partial disability compensation.

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[12] *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1998).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated January 6, 2005, is modified to reflect claimant is entitled to a 17 percent work disability.

The claimant is entitled to 12.21 weeks of temporary total disability compensation at the rate of $303.70 per week or $3,708.18 followed by 70.55 weeks of permanent partial disability compensation at the rate of $303.70 per week or $21,426.04 for a 17 percent work disability, making a total award of $25,134.22, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of June 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jim Lawing, Attorney for Claimant
Robert G. Martin, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

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Self-Insured Respondent	)	

ORDER NUNC PRO TUNC

It has come to the Board's attention that a compensation error was made in the Board's Order issued on June 30, 2005. Specifically, the temporary total disability compensation was paid at the wrong benefit rate and is hereby corrected as follows:

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated January 6, 2005, is modified to reflect claimant is entitled to a 17 percent work disability.

The claimant is entitled to 12.21 weeks of temporary total disability compensation at the rate of $253.65 per week or $3,097.07 followed by 70.55 weeks of permanent partial disability compensation at the rate of $303.70 per week or $21,426.04 for a 17 percent work disability, making a total award of $24,523.11, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of July 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jim Lawing, Attorney for Claimant
Robert G. Martin, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director